

An appeal

- by -

Ray Kennedy
("Kennedy")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2001/398

DATE OF HEARING: July 31, 2001

DATE OF DECISION: August 14, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and by Ray Kennedy (who I will refer to as both “Kennedy” and “the Appellant”). Kennedy appeals a Determination issued on April 26, 2001 by a delegate of the Director of Employment Standards (“the Director”). The Determination is that 20 Vic Management Inc. (“the employer”) is not liable to pay Kennedy compensation for length of service because the employee terminated his employment.

Kennedy, on appeal, argues that the delegate is wrong on the facts. He claims that he did not say that he was quitting. He claims a right to protest, breach of contract and that he was terminated by the employer. I have considered his appeal and find that it was Kennedy and not the employer that acted to terminate the employment and that, even if termination was by the employer, it does not follow that the employee is owed length of service compensation.

An oral hearing has been held in this case.

APPEARANCES:

Ray Kennedy

On his own behalf

Fay Hickey

For 20 Vic Management Inc.

ISSUES TO BE DECIDED

Kennedy claims that the delegate errs in setting out the facts.

The issue is the matter of whether the employee did or did not quit. The employee admits that he left work on two successive days in a disagreement with senior management and that, on leaving on the second day, he said “I am out of here” and indicated that he could not work for a company that showed so little regard for safety. He denies, however, that it was ever his intention to quit and he claims that he was only exercising his right to protest working conditions.

Should I find that there is not evidence to support a conclusion that Kennedy quit, I must then decide whether he is then entitled to compensation for length of service. An employer is not required to pay length of service compensation where an employee’s termination is for just cause. Kennedy claims that he is entitled to such compensation for reason of a breaching of the employment contract.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled and a matter or matters referred back to the Director for reason of an error or errors in fact or law.

FACTS

In claiming that the delegate errs in respect to the facts, Kennedy complains that the Determination contains several factual errors. He also claims that the delegate failed to interview witnesses who are a key part of his case and that she failed to consider important evidence. As matters have been presented to me, I find that the following is of importance to the appeal.

Ray Kennedy worked for 20 Vic Management Inc. from November 17, 1998 to January 12, 2001. The employer operates Lougheed Mall. Kennedy held the position of Security Supervisor. As such he was required to direct and supervise a number of security officers.

Kennedy's job description calls for him to "provide effective leadership ... and direction to security staff", "ensure compliance with all standardized safety and security policies and procedures" and "ensure that safety practices are met".

The Security Supervisor reports to the Operations Manager.

On January 11, 2001, employees found what appeared to be a water leak but it was soon realized that they were dealing with a chemical of some sort. Kennedy wanted extensive safety measures taken as a precaution, the cordoning off the site of the spill and calling in the fire department included. He was overruled by Walter Soloski, the Operations Manager. Soloski simply instructed staff to identify the source of the problem and mop up the mess.

It is not that Kennedy was directed to perform work which put his own safety at risk. Kennedy is concerned that Soloski's handling of the chemical spill put the safety of other employees and the public at risk. He notes that Soloski did not know what the liquid was. He also notes that while the chemical turned out to be hydrogen peroxide, it was enough to cause minor injuries. Both Soloski and another employee suffered minor burns in attending to the spill. In Kennedy's view, he should not have been overruled by Soloski because Soloski is not trained and has no experience in matters that involve safety and security.

On being overruled by Soloski, Kennedy immediately went to see Fay Hickey, the mall's general manager. Hickey was, however, at home because she was recuperating from minor surgery. On being told that Hickey was unavailable, Kennedy told Trish Zaradnik, the mall's Executive Secretary/Office Assistant, that he was leaving. He handed her his keys, radio and company cell phone and he left the mall. That was in mid-shift. As such, security officers were left without their immediate supervisor.

It is clear to me that Zaradnik was left with the impression that Kennedy had quit. She telephoned Kennedy that very evening and she tried to talk Kennedy into reporting for work the next day.

Soloski called Kennedy that same evening. He expressed regrets over what had happened and apologised.

It is clear that on hearing from Zaradnik and Soloski Kennedy felt that things were not quite as bad as first imagined. He reported for work on the 12th, on time, as is his habit. Soon after arriving for work, he spotted Soloski and the two were soon discussing the chemical spill once again. In this conversation, Soloski did not say that he would act on Kennedy's advice in the future but went so far as to say that, in his view, his approach to the chemical spill was the correct approach. That annoyed Kennedy and he announced for a second time that he was leaving. That prompted Zaradnik to telephone Hickey who was still on medical leave.

Zaradnik was able to reach Hickey and she put Kennedy on the line. Exactly what was discussed is a source of dispute. As Kennedy presents matters to me, he did not say that he was quitting and Hickey agreed to meet with him on Monday. Hickey agrees that she suggested that they meet on Monday but she claims that the offer to meet on Monday was conditional, that Kennedy had to continue working. Kennedy is said to have rejected that offer and said that matters could not wait until Monday and that he was leaving because he could not be part of a management team that had so little regard for public safety. According to Hickey, she asked Kennedy three times if that meant that he was quitting and she claims that, on being asked the question a third time, Kennedy said, "Yes, I guess I am".

There were no witnesses to the telephone conversation between Kennedy and Hickey and the employee denies saying that he was quitting but, like the delegate, I prefer the employer's version of events over that of the employee. It is clear that Kennedy, prior to leaving work on the 12th, said "I'm out of here" and that "he could not be part of a management team that allows this to happen and therefore I would be leaving". That is what Kennedy has had to say to me. It is clear that, on leaving, Kennedy did not indicate that it was his plan to return at some point. It is also likely that Hickey would have demanded that Kennedy stay working until such time as she could meet with him as she would not have wanted the mall to operate without a Security Supervisor.

Kennedy did not work Saturday the 13th, nor did he work Sunday the 14th. Both of those days were regular days of work for him. On being hired, his regular days off were Tuesday and Wednesday but that was changed so that he had Mondays and Tuesdays off.

On Monday, Hickey returned to work. She did not contact Kennedy. She had reached the conclusion that the employer should not make an effort to persuade Kennedy to remain as its Security Supervisor and that it should hire someone else.

Hearing nothing from the employer on Monday, Kennedy sought to meet with the employer. He met with Ray Armour, the employer's Vice-President for Western Canada, on Tuesday the 16th but nothing changed with that meeting. Kennedy was still demanding that the employer make changes in respect to the handling of situations like the chemical spill. The employer made no move to do so.

ANALYSIS

Kennedy would have me consider other evidence but I fail to see how it is relevant. It does not matter that the employer has terminated other employees or that Hickey had, some months before the above incidents, discussions with Franco De Biase, then Security Manager of the mall, on whether Kennedy's work was satisfactory or he should be terminated. It is irrelevant that nasty fumes were allowed to fill the mall one day and that the contractor responsible for that was found to be working with an invalid WHIMIS sheet (a permit of sorts), and there is evidence that the date on that sheet was forged. Reports filed by the Workers Compensation Board in respect to the chemical spill and the employer's procedures, or lack of them, are also unimportant to the appeal.

Kennedy alleges that the employer did not allow him to do his job and that, as such, there was a breaching of the employment contract but the *Act* does not provide a remedy for such breaches of contract. I find, moreover, that the employee fails to show breach of contract. Nothing in the employment contract prevented a senior manager like Soloski from overruling Kennedy, the Security Supervisor. That senior managers may overrule junior managers is an implicit part of Kennedy's employment contract.

Contrary to what the employee appears to believe, he does not have a right to protest that others are being asked to work in unsafe working conditions or a lack of concern for public safety. (That is not to say that public safety or that of employees was ever at risk. I need not decide that for the purpose of deciding this appeal.)

Only the circumstances of the employee's termination are material to the appeal. If it is that Kennedy quit, or he was terminated by his employer for just cause, he is not entitled to receive length of service compensation.

63 (3) The liability is deemed to be discharged if **the employee**

(a) is given written notice of termination as follows:

- (i) one week's notice after 3 consecutive months of employment;
- (ii) 2 weeks' notice after 12 consecutive months of employment;

- (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
- (c) **terminates the employment**, retires from employment, **or is dismissed for just cause.** (my emphasis)

It is an employee's right to resign and that right is personal to the employee. An employer may not deem that an employee has quit.

The Tribunal has long held that there must be clear, unequivocal facts to show that the employee voluntarily exercised his or her right to quit. And quitting has been found to have both a subjective and an objective element. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with continuing the employment [*Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BC EST #D091/96].

In this case, the delegate has decided that Kennedy both voiced an intention to quit and that he acted on that intention in that he left work in mid-shift on the 11th and, after being coaxed back to work, left his post for a second time on the 12th. Kennedy, on appeal, denies using words like "I quit" but, as noted above, I am satisfied that he did in fact announce a plan to quit, albeit a conditional one. He, in effect, said that he was quitting unless the employer did something to address his concerns over Soloski's handling of the chemical spill because he did not want to be part of a management team that had little regard for public safety and that of employees, at least in his view.

The above having been decided, the question is, Did Kennedy act in a way or demonstrate conduct which is inconsistent with continuing the employment? Again, I find myself in agreement with the delegate. Hickey did not address any of Kennedy's concerns in speaking to him on the 12th, nor did the employer subsequently address his concerns. Yet the employee left work early on the 12th and did not subsequently report for work. It is of no importance that the reason for that is that the employer did not meet his conditions for continuing as Security Supervisor, or that Kennedy sought further meetings with his employer. It is not as if Kennedy had a change of heart. He stuck by his demand that the employer do something to address his concerns. And because the employer did not, he failed to report for work. In doing so as he did, the employee acted to carry out his plan to quit.

There is a fine line between outbursts of emotion and acts of protest which are understandable in the circumstances and quitting and, for that matter, insubordination. A single outburst of emotion or some rash act is one thing. But Kennedy carried on. He went too far walking out on the employer a second time and then remaining off the job as he did. While I have decided that

the Determination is correct, that it is Kennedy that terminated the employment, I would not have awarded Kennedy length of service compensation even if my finding were to the contrary: That termination was at the hand of the employer. The employer in the circumstances of this case had also had just cause to terminate the employee.

I have decided to confirm the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 26, 2001 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal